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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 372

In the Matter of Proving the Last Will and Testament of

HENRY ALTMAYER,

Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner.

—*vs.*—

BEATRICE ALTMAYER RODNEY,

Respondent,

—*and*—

DONALD T. MULLANE,

Special Guardian.

PETITIONER'S REPLY TO BRIEF OF SPECIAL GUARDIAN AND BRIEF OF RESPONDENT

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Preliminary Statement.

A consideration controlling every point raised in this Court is that the Appellate Division, not the Surrogate's Court, was the trial court in this case. The matter was there

considered *de novo* under Surrogate's Court Act §309 upon evidence which was not before the Surogate and which was offered and considered for the first time in the Appellate Division (See pages 8-10 of this brief).

Answer to Respondent's Point I.

The principle for which the case of *Fullerton* v. *Texas,* 196 U. S. 192 and the other cases cited by respondent in her Point I stand is one with which we have no quarrel and it is concededly the general rule that a federal question first raised by petition on rehearing is not timely.

But there is an exception to that general rule that is as well established and well recognized as the rule itself, (*Great Northern Ry.* v. *Sunburst Oil Co.* 287 U. S. 358, 367), and that is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon the appeal, or is done unexpectedly at the end of proceedings when the aggrieved party no longer has any right to add to the record, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing and the challenge will be timely. *Herndon* v. *Georgia,* 295 U. S. 441.

The petition here shows that the federal claim arises from the unanticipated disposition of the case at the close of proceedings in the Court of Appeals, and this consideration puts this case forsquare within the rule enunciated in the cases of:

Brinkerhoff-Farris v. *Hill,* 281 U. S. 673, 677, 678;
Saunders v. *Shaw,* 244 U. S. 317, 320;
Ohio v. *Metropolitan Park District,* 281 U. S. 74, 79;
American Surety Co. v. *Baldwin,* 287 U. S. 156, 164;

Missouri ex rel Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;
Great Northern Ry. v. *Sunburst Oil Co.*, 287 U. S. 358, 367;
Herndon v. *Georgia*, 295 U. S. 441, 444, 446, 447.

In *Saunders* v. *Shaw* (*supra*) the Court said:

"But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceedings when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for the infraction of constitutional rights if the party aggrieved could not come here. The defendant was not bound to contemplate a decision of the court before his evidence was heard. He therefore was not bound to ask a ruling or to take other precautions in advance."

In the *Herndon* v. *Georgia* case (*supra*) Mr. Justice Cardozo, in a dissenting opinion stated:

"The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon the appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely."

The majority opinion in the *Herndon* case agreed, in that regard, with Mr. Justice Cardozo, the Court saying at page 444:

"There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented at the first opportunity for raising it. (Citations). The

> whole point, therefore is whether the ruling here assailed should have been anticipated."

The whole point in this case, too, is "whether the ruling here assailed should have been anticipated." The petitioner here was not bound to anticipate the ruling of the Court of Appeals, as will hereinafter be adequately demonstrated.

Answer to Respondent's Point II.

The case of *Brinkerhoff-Farris* v. *Hill* (*supra*) is a complete answer to respondent's claim that this court can have no jurisdiction because the Court of Appeals denied petitioner's motion for reargument. It was there held that

> "A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, *even though the petition was denied* without opinion." (Italics ours).

We have shown in our main brief, and it will more fully hereinafter appear, that the federal question in this case was raised at the first opportunity.

If the federal right has been denied at the close of proceedings on appeal, and the federal question is thereupon raised at the first opportunity on rehearing, the jurisdiction of this Court attaches, and naught that the state court may do can oust this Court of jurisdiction, for otherwise it would rest with the state court whether to confer or withhold the jurisdiction of this Court. Such a concept would be repugnant to the supervisory power reposed in this Court for the protection of federal rights. It is this reason which underlies the rule in the *Brinkerhoff-Farris*

case, just above quoted, and the declaration of this Court in the case of *Saunders* v. *Shaw* (*supra*) that if the party aggrieved could not come here in such case, "it would leave a serious gap in the remedy for the infraction of constitutional rights."

As to Whether Petitioner Should Have Anticipated the Ruling Complained of.

We have said on page 19 of our main brief that the Appellate Division held that:

> "'The contestant claims an intestacy *by reason of the revocation of the will.* The question was presented by contestant's claim that in 1939, in her presence and in the presence of the witness Kelekian, the testator had destroyed the original will with the intent of revoking it.'
>
> and admitted the will to probate. With the issue thus defined and judically settled, petitioner had no occasion to anticipate that the Court of Appeals would dispose of the appeal by sustaining a defense neither pleaded nor proved, upon grounds not relied upon by contestant to obtain the relief granted."

Let us see, then, whether petitioner should have anticipated such action by the Court of Appeals. The Appellate Division defined the issue involved as revocation by destruction and at this juncture, the will was admitted to probate. When the contestant appealed to the Court of Appeals, she appealed from the order of the Appellate Division which directed that the will be admitted to probate. What were the grounds upon which the appeal was taken? Of what did she complain and by reason of what did she contend, in the Court of Appeals, that she was aggrieved?

Only the following three grounds were advanced in the Court of Appeals and upon them she contended she was entitled to a reversal, namely:

> "Point I: As a matter of law the Appellate Division erred in its finding of fact."
> "Point II: A reversal of the judgment below is in any event required because the testimony on which it is grounded is in the record only because serious errors in rulings by the Surrogate admitting testimony by a lawyer of confidential communications received by him from his client in the course of his employment by such client:"
> "Point III: The declarations by deceased were inadmissible."

With Points II and III we are not concerned as they deal with the admissibility of certain evidence (decedent's declarations and the admission of contestant that the will was in the box) not pertinent to the inquiry here.

As to Point I, however, the claims advanced by contestant are significant in two aspects. (1) They are predicated upon the physical destruction of the will by tearing and (2) no claim is made that the will could not be found and that therefore a presumption of destruction *animo revcandi* arose.

Her claim, then, under her Point I in the Court of Appeals was (and we quote):

> "The Appellate Division placed its reversal on a determination that the appellant, Mrs. Rodney, had so conducted herself in relation to Mr. Wasserberger that *her testimony regarding physical destruction of the instrument in or about 1939* should be rejected. The disinterested testimony of Mr. Kelekian, ignored by

the Surrogate, was pronounced by the Appellate Division to be 'highly improbable'.

It is submitted that a fair reading of Mr. Kelekian's testimony will not bear out the estimate of it by the Appellate Division. Mr. Kelekian was quite clear about what he had witnessed in 1939. What he testified had happened manifestly could have happened.

The Surrogate evidently found that there was nothing done or said by Mrs. Rodney, which, when viewed in the light of all the circumstances, established any admission that the missing will physically existed *after 1939*. The proof shows that in 1940 Mr. Wasserberger on his own initiative told Mrs. Rodney that a codicil was necessary to the will. He actually drafted such a codicil and sent it to her. If the will had physically existed *at that time* is it likely that Mrs. Rodney would have done nothing about Mr. Wasserberger's suggestion? Her inactivity is itself an important indication that the *narrative of Mr. Kelekian and herself regarding the destruction of the will in 1939 was the narrative of the actual fact*. Moreover, consider what the likely attitude of Mrs. Rodney would be in respect of Mr. Wasserberger on the subject of the destruction. Remember that Mr. and Mrs. Wasserberger were then her close friends. Is it not likely that Mrs. Rodney would keep secret *the fact of destruction*, since it was connected with an episode unflattering to Mr. Wasserberger?" (Italics ours).

Her contention, then, in the Court of Appeals was that her testimony and Kelekian's testimony as to the tearing of the will in 1939 was true, that "the narrative of Mr. Kelekian and herself regarding the destruction of the will in 1939 was the narrative of the actual fact" and that what Mrs. Rodney concealed from Mr. Wasserberger was "the fact of destruction".

Her contention in the Court of Appeals was that the Appellate Division had erred in rejecting her testimony of destruction and in pronouncing Kelekian's testimony "highly improbable"; that the error consisted in the failure of the Appellate Division to accept "the narrative of the actual fact" of destruction.

Since the Appellate Division defined the issue as revocation, and admitted the will to probate upon that issue and since she claimed that her proof of destruction by tearing established the revocation which she pleaded in her answer, upon what basis can it be asserted that the proponent should have anticipated that the Court of Appeals would grant her relief by way of reversal upon grounds which were not relied on by her to obtain that relief upon an issue that was never litigated in any court. She never claimed, nor did she plead, nor did she prove, in the Surrogate's Court, the Appellate Division nor in the Court of Appeals that the will could not be found when the decedent died. It was not even contended for on the *argument* that the will could not be found and that therefore it must be presumed destroyed *animo revocandi*.

Now the Surrogate found that "the presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its nonproduction," predicated upon a finding that the will could not be found. The question arises whether such a finding by the Surrogate bound the proponent to anticipate that the Court of Appeals would make a similar finding. The answer is in the negative, as the following considerations clearly demonstrate.

We invite the attention of this Court to the fact that in the State of New York an appeal from a Surrogate's decree taken under Sec. 309 of the Surrogate's Court Act differs from an appeal taken from any other judgment in this important respect, namely, that the Appellate Division sits as a court of original jurisdiction as distinguished

from appellate jurisdiction, having the same power to decide the facts as the Surrogate had. The proceeding is before the Appellate Division *de novo* and it sits as a trial court.

Thus, in the Matter of Baldwin's Will, 261 App. Div. 111, 215 N. Y. Supp. 149, the Court said:

> "Whether the will in question was executed in accordance with the statutory requirements is a question of fact. (Citations). This court is required to review the facts *de novo* (Surrogate's Court Act (Laws 1920, c. 928) sec. 309."

Accord: Matter of Dunn's Will, 261 App. Div. 1040, 25 N. Y. Supp. (2) 880

In the Matter of Patterson's Will, 63 Hun. 529, 18 N. Y. S. 499, 500, the court declared:

> "In determining this question, it is necessary in the first place, to bear in mind the effect of an appeal to the Supreme Court from the Surrogate's court. A probate proceeding, by such appeal, is removed into the supreme court. *The supreme court becomes a court of original jurisdiction,* and has the same power which the Surrogate had; and may, in its discretion, receive further or documentary evidence, and appoint a referee." (Italics ours).

Again, in the Matter of Rice's Will, 81 App. Div. 223, 81 N. Y. Supp. 68. it was said:

> "This we have a right to do, because we sit more as a trial court upon the facts than as a court of review."

In this case the appeal to the Appellate Division was taken under Section 309 of the Surrogate's Court Act.

Moreover, evidence was presented to the Appellate Division which was not before the Surrogate for consideration. Thus the testimony of Mrs. Rodney appearing at pages 294 to 352 inclusive of the transcript of Record, marked "Deposition Received under sec. 309 of the Surrogate's Court Act" was not offered in evidence on the trial before the Surrogate, but was offered for the first time on the appeal to the Appellate Division and there, necessarily, considered *de novo*. Of greater significance is the affidavit of Mrs. Rodney (R. 290-293) marked "Affidavit of Beatrice Altmayer Rodney Received under Sec. 309 SCA" which was not offered in evidence on the trial before the Surrogate but offered for the first time on appeal to the Appellate Division. In paragraph 7 of this affidavit (R. 292) Mrs. Rodney states:

> "Deponent is willing to concede for the purposes of this proceeding * * * that deponent did not search decedent's safe deposit box, subsequent to the date of his death for decedent's will."

The concession thus made by her, taken together with the fact that after decedent's death the safe deposit box was never fully examined (R. 75) precluded any claim that the will could not be found, had such a claim ever been advanced.

The import of these considerations is that the Surrogate's findings were not alone academic, they were superceded by a new trial on different evidence in the Appellate Division which entertained the proceeding as a court of original jurisdiction under section 309 and considered the matter *de novo*. For that reason, the findings of the Appellate Division, and not those of the Surrogate, were the findings of the Court of first instance.

The Appellate Division had her concession (which the Surrogate did not have) *for all purposes of this proceeding,* that she did not search testators safe deposit box for the will after his death. Once that concession became part of the record, petitioner was not bound to anticipate that there could ever be a finding of fact that the will could not be found, or that presumed destruction could ever be predicated on such a finding of fact.

Since the Appellate Division made no finding that the will could not be found and made no conclusion of law that a presumption of destruction *animo revocandi* attached, the proponent was not bound to anticipate that the Court of Appeals would do so.

In *Grannis* v. *Ordean,* 234 U. S. 385, 392 this Court declared:

> "There is a motion to dismiss on the ground that the federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfus. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged Federal right."

The Appellate Division, as we have seen, and not the Surrogate, was the trial court in this case. and the Appellate Division upheld the petitioner. It was the decision of the Court of Appeals that first ran counter to the federal rights. Therefore the first opportunity to raise the federal question was upon reargument, and of this earliest oppontunity petitioner availed himself. The federal question was thus timely raised.

Answer to Respondent's Claims Predicated on the Affidavit of Lawrence S. Timen (Respondent's Points V and VI).

We claimed, in our petition and brief here, that it was neither pleaded nor proved in the courts below, that the will could not be found thereby giving rise to presumed destruction *animo revocandi* and that such issue was neither litigated nor heard in the court below.

Respondent asserts that the claim that the will could not be found after death, and the presumption of destruction *animo revocandi* arising therefrom, was not only pleaded and proved below, but that she relied upon that issue to obtain relief in all courts. As proof of such assertion she relies on the affidavit of Lawrence S. Timen.

If she is correct, then this Court must look to the Timen affidavit, and not to the Transcript of Record to determine that

> "the notice and the hearing should correspond, and that the relief granted should be appropriate to that which has been heard and determined on such notice"

in testing for denial of due process by the requirements specified by this Court in *Standard Oil Co.* v *Missouri*, 224 U. S. 270, 281.

Preliminary to any consideration of the merits of her claim, it is to be noted that the Timen affidavit, no matter what its contents, cannot serve to establish that Mrs. Rodney pleaded and proved that the will could not be found, that she relied on the presumption arising therefrom that it was destroyed *animo revocandi* or that she gave notice of that claim to proponent. The Timen affidavit can establish nothing contrary to the record, and even if Mr. Timen has sworn, in his affidavit, that Mrs. Rodney had pleaded and

proved, in the court below, that the will could not be found and that she relied on the presumption of destruction arising therefrom, such an allegation in his affidavit would have no more probative force than the allegations of similar import contained in the affidavit of Mr. Vaughan. Only the transcript of record can disclose whether Mrs. Rodney pleaded and proved that the will could not be found after death. The transcript is before this Court. Where, in Mrs. Rodney's answer (R. 24) is there any allegation that the will could not be found after death? It is there pleaded that the will was revoked.

What of the presumption of destruction *animo revocandi?* There can be no such presumption, as we have shown on page 20 of our main brief, unless it be established as a *fact* that the will could not be found, because the presumption arises only from such fact. *Schultz* v. *Schultz,* 35 N. Y. 654.

Her answer shows, then, that she did not plead that fact. Did she prove it? Her proof was not that the will could not be found because no one knew what became of it. She knew what became of the will. She testified to what became of it and so did her witness. They both testified, not that the will could not be found, but that it was destroyed by testator when he tore it, in their presence, in 1939.

It would be of no help to her if this Court were to assume that (a) she pleaded but did not prove the will could not be found, or (b) that she proved but did not plead the will could not be found, because

> "* * * the allegations and the proofs must agree, that the Court can consider only what is put in issue by the pleadings, that averments without proof and proof without averments are alike unavailing, and that the

decree must conform to the scope and object of the prayer and cannot go beyond them." *Washington R. R. Co.* v. *Bradleys,* 77 U. S. (10 Wall) 303.

It remains to consider her claims on the merits. We will consider these claims separately.

The Timen Affidavit is Dehors the Record.

Petitioner's grievance is that the court below gave judgment upon an issue which was neither pleaded nor proved. That issue is that the will could not be found, giving rise to its presumed destruction *animo revocandi.*

Respondent asserts that on the contrary the issue was in fact pleaded and proved below, and relies on the affidavit of Lawrence S. Timen to support that assertion.

Respondent also asserts that the Timen affidavit establishes that petitioner anticipated the ruling of the Court of Appeals, and that therefore the federal questions were not seasonably raised.

In fact the Timen affidavit is the cornerstone of respondent's opposition to certiorari. It is not in the Transcript of Record here, nor was it before the Court of Appeals for consideration, and although *dehors* the record, is availed of as a rabbit's foot, a panacea, to cure all defects below.

But the Timen affidavit is relied on, like an overruled case, as though the motiaon for resettlement, in support of which it was made, had not been granted. Whatever qualms or apprehensions petitioner had, or should have had, as to the ruling to be made by the Court of Appeals, were removed by the granting of the motion for resettlement, as will hereinafter be abundantly demonstrated. But it is not competent to establish by the Timen affidavit that such issue was litigated and heard below. Only the record here is competent to establish that fact. The Timen affidavit

was not before the court below nor was it the evidence upon which the court below made the ruling which is here assailed. It is *dehors* the record and nothing *dehors* the record (save to show that a case has become moot) may be considered here. Thus in *Russell* v. *Southard,* 53 U. S. 139, 159, this Court said:

> "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court, sitting as an appellate tribunal."

In *Hudgins* v. *Kemp,* 59 U. S. (How.) 530, 534, this Court said:

> "And upon a motion to dismiss as well as on a hearing on the merits, no evidence *dehors* the record as certified and returned by the clerk in the circuit court, can be recited here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this Court."

In *Bechtel* v. *United States,* 101 U. S. 597, 600:

> "We cannot look beyond the record, and that is silent upon the subject."

In *Holmes* v. *Trout.* 32 U. S. (7 Peters) 171, 209:

> "No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; *and the evidence certified with the record must be considered here as the only evidence before the court below.*" (Italics ours).

In *Thornton* v. *Carson,* 11 U. S. (7 Cranch) 596, 601:

> "There are other causes assigned why the award is unreasonable; but as the facts to prove it unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award."

Again, in the case of *England* v. *Gebhardt*, 112 U. S. 502, where, as in this case, it was sought to offer an affidavit *dehors* the record, this Court at page 505, said:

> "* * * Nothing can be considered here on such writ in this class of cases, any more than in others that is not presented in some appropriate form by the record. * * * The affidavits, copies of which appear in the transcript, form no part of the record proper. The mere fact that a paper is found among the files does not of itself make it part of the record."

It follows, therefore, that even if there were merit to respondent's contentions regarding the Timen affidavit, it can receive no consideration here. But there is no merit to those contentions, as will be seen from the following analysis of her claims.

As to the Claim that the Timen Affidavit Establishes that Respondent Relied on the Presumption of Destruction Animo Revocandi in the Court Below.

In support of the proposition that the Timen affidavit establishes that Mrs. Rodney relied upon the presumption of destruction in the court below, she quotes from the Timen affidavit as follows:

> "This is particularly significant in view of the fact that the contestant urged a proposition of law in the

court below and in this court that by reason of non-production of the will by proponent there arises a presumption that the testator destroyed his will with intent to revoke."

Upon this language respondent seeks to establish that the issue in question was in fact litigated and heard below. We have above shown that the Timen affidavit is not competent to establish that fact, and that only the record may be availed of to determine the question. But on the merits, her claim in that regard is subject to four fatal defects:

1. The issue which, by the Timen affidavit, she seeks to show was "urged" in the courts below was not "urged" by way of pleading and proof so as to give the requisite notice to which petitioner was constitutionally entitled under the due process clause.

2. The question was "urged" by way of oral argument and briefs which are not part of the record.

3. Her oral argument and briefs did not "urge the proposition" until after petitioner had put in his proof and rested his case.

4. The question was not "urged" at all in the Court of Appeals. Even if it had been, petitioner no longer had any right to add to the record in the Court of Appeals.

Defect No. 1. To meet the constitutional requirement of notice, the question must be put in issue by the pleadings.

"That due process of law without which parties may not be deprived of their property gives them an op-

portunity to be heard respecting the justice of the judgment sought. *It gives notice of the issue to be determined before it is tried" Castle* v. *Persons,* 117 Fed. 843 (Italics Ours).

The grounds "relied on" to obtain the relief granted must be set forth in the pleadings and supported by proof. No other "reliance" meets the requirements of due process. In *Washington Railroad* v. *Bradleys,* 77 U. S. (10 Wall) 299, 303, this Court declared:

"It is hardly necessary to repeat * * * that the allegations and proofs must agree, that *the Court can consider only what is put in issue by the pleadings,* that averments without proofs and proof without averments are alike unavailing * * *". (Italics ours)

In *Gentry* v. *United States,* 101 Fed. 51, the Court said:

"A court can consider only what is in issue under the pleadings. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of our jurisprudenre that no man shall be deprived of his life, liberty or property without due process of law, and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought."

In *Burton* v. *Platter,* 53 Fed. 901, 905, the Court said:

"A judgment or decree, to be valid, must be according to the pleadings and the proofs. The judgment is according to neither, and upon this ground it must be reversed."

In *Mofft-West Drug Co.* v. *Byrd,* 92 Fed. 290, 291, the Court said:

> "The purpose of pleadings is to notify the parties of the grounds upon which a recovery is sought or a defense is based. No rule is more indispensable to the just and impartial administration of justice, and none is better settled, than that the recovery permitted or *the defense sustained must be in accordance with the allegations and the proofs.*" (Italics ours)

It is therefore no answer for respondent to assert that the proposition was "urged" below. To give notice, it needed to be pleaded, and the proofs needed also to support the pleadings. Her proof was that the will was torn and thereby revoked. (R. 178, 216, 340)

In *Boone* v. *Chiles,* 35 U. S. (Peters) 177, 209, the court stated:

> "There was therefore no allegation in the answer of either, which referred to the deed; it was not made a part of their case, which was put on a *contract* of purchase and not a *deed* consummating it by a conveyance. A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former, (citations) and there is no one subject of equity cognizance on which there is a wider difference between a deed and a contract of purchase, than in the one now under consideration."

In the case at bar there is no one subject of cognizance in decedent estates on which there is a wider difference than exists between a will that is revoked or attempted to be revoked by its physical destruction and a will which cannot be found after search because no one knows what has

become of it and is therefore *presumed* to have been destroyed.

She did not plead that the will could not be found, and her claim of "reliance" thereon accordingly collapses.

Defect No. 2. The Timen affidavit does not convey nor was it intended to convey, that the "proposition which was urged" by contestant was raised by her in her pleadings and proof. The transcript of record here excludes any such hypothesis. Mr. Timen referred in his affidavit to her oral argument and her briefs submitted after petitioner's proof was in and the record closed. (See Defect No. 3, post).

Briefs are not part of the record. In *Harding* v. *Illinois*, 196 U. S. 78, 84, the Court said:

> "Nor does certification of the briefs by the clerk of the state supreme court, *which are no part of the record*, help the matter." (Italics ours)

In *Wall* v. *Cox*, 181 U. S. 244, 247, it was said:

> "* * * we are confined to the facts stated in the certificate and cannot consider the allegations made in the briefs of other facts."

Defect No. 3. Her oral arguments and briefs, did not "urge" the proposition below until after petitioner had put in his proof and rested his case. (R. 257, 151.)

A claim that no will has been found cannot serve as a claim that the will *could not* be found. The latter obtains from search and inability to find, the former imports failure to search and it is conceded for all purposes of this

litigation that there was no search (R. 292, par. 7). Even if she had "urged" that the will could not be found, it was necessary that she do so before petitioner had rested his case, in order to satisfy the constitutional requirement as to notice. Thus in *Castle* v. *Persons,* 117 Fed. 835, 843, the Court said:

> "One may not bring suit upon one cause of action and recover on another, nor may he go to trial upon one defense and sustain judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter *no notice of which was given by the pleadings or by the course of the trial until plaintiff had introduced substantially all his evidence.* Proof without averments and averments without proof are equally unavailing (citations)". (Italics ours)

It has above been shown that the Appellate Division and not the Surrogate's Court is the trial court in this case; that it was a trial de novo in the Appellate Division, under section 309 of the Surrogate's Court Act, upon new evidence which was not before the Surrogate, and which was offered and considered for the first time in the Appellate Division. The statute specifies that new roof may be received in the case. Petitioner put in additional evidence (R. 283-352). Respondent could then have availed herself of the opportunity to put into the record a claim that a search had been made for the will but it could not be found. She could have there offered additional testimony and had a referee appointed. It was a trial de novo. But it was only after the record was closed, and stipulated to as containing the whole case, that she "urged" in her argument that the presump-

tion of destruction obtained, not from the fact that the will could no be found, but from the fact of its "nonproduction by proponent".

"Nonproduction" does not give rise to the presumption because it is not equivalent to the fact that the will could not be found. The latter fact is the basis of the presumption. *Schultz* v. *Schultz,* 35 N. Y. 653, whereas wilful suppression of an existing will would create "non-production" but could not create a presumption of destruction *animo revocandi.*

Defect No. 4. She did not "urge" the question at all in the Court of Appeals, and it is the proceeding and the ruling in that court which is here assailed. That is the court which first denied petitioner his federal rights. And in that court it was too late for petitioner to add to the record. Thus, in *Saunders* v. *Shaw,* 244 U. S. 317, 320, the Court declared:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice granted this writ. Of course, ordinarily, this would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding *when the plaintiff in error no longer had any right to add to the record,* it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance." (Italics ours)

Regarding Respondent's Claim that the Timen Affidavit Establishes that Petitioner Anticipated the Ruling of the Court of Appeals.

The language of the Timen affidavit here relied upon by respondent is as follows:

> "Under the last sentence contained in Section 602 of the Civil Practice Act, the proponent would be prejudiced unless the order were resettled to specify the findings of this Court and the findings of the court below which were reversed in that *in the absence of such specification,* there would be a *presumption* in the Court of Appeals, upon appeal to that Court, *that finding of fact made by the Surrogate that the will could not be found at testator's death, was affirmed* (i. e. by the Appellate Division) and that the reversal in this Court was upon questions of law only. * * *
>
> Resettlement is therefore asked so that if the Court of Appeals deems fit to sustain the presumption of destruction *animo revocandi* urged by the contestant in this Court and in the court below, *it would need to do so only after reviewing the facts,* and reversing the findings of fact made in this Court, *instead of presuming that this Court agreed with the Surrogate that the will could not be found at* the time of the testator's death."

We have above italicized that portion which demonstrates what was anticipated, the nature of the relief sought to overcome petitioner's apprehensions, and that such apprehensions obtained only "in the absence of such specifications", that is, in the absence of resettlement.

What was anticipated was that, had the Appellate Division made *any* error in law, the Court of Appeals would be

compelled, in the absence of resettlement, to give judgment upon findings of fact which it was powerless to review, regardless of whether or not there was any evidence in the record to support those findings. In short, what was apprehended was that the Court of Appeals would be compelled to give judgment without looking at the facts, and not that it would look at the facts and then give an improper judgment; and it was so apprehended because:

1. The jurisdiction of the Court of Appeals was "limited to the review of questions of law" only, and it had no power to review questions of fact except where the Appellate Division made new findings of fact and reversed those of the trial court (New York State Constitution Article 6, sec. 7).

2. Under section 602 of the Civil Practice Act, (in the absence of new findings of fact by the Appellate Division and reversal of the Surrogate's findings) the Court of Appeals *must* presume that the Appellate Division affirmed the findings of fact made by the Surrogate, that the will could not be found at testator's death. As stated in the Timen affidavit: ". . . there would be a *presumption* in the Court of Appeals . . . that finding of fact made by the Surrogate that the will could not be found at testator's death *was affirmed*" (i. e. by the Appellate Division). Thus, in *Karl* v. *State of New York,* 279 N. Y. 555, the Court said:

> "The Appellate Division reversed the awards made to claimants by the Court of Claims and dismissed the claims as a matter of law. It did not, however, reverse any of the findings of the Court of Claims, or make any new findings. The findings

of the Court of Claims, therefore, stand as affirmed by the Appellate Division. Civil Practice Act, sec. 602."

3. That the constitution and the statute rendered the Court of Appeals powerless (in the absence of resettlement) from reviewing the facts and disabled it from searching the record to determine whether there was any evidence to support a finding of fact that the will could not be found, and placed the Court of Appeals under statutory compulsion to give judgment upon the fact found by the Surrogate and presumed affirmed by the Appellate Division; thus the Court of Appeals would have no alternative but to hold, from such finding, that the presumption of destruction attached and give judgment on an issue neither pleaded nor proved.

But the need to apprehend or anticipate such a ruling (which could obtain only in the absence of resettlement) was forever removed when the Appellate Division granted the motion to resettle its order of reversal. In the resettled order (R. 279-283) the Appellate Divition made its own finding of fact and reversed the Surrogate's findings of fact, *thereby forever barring the Court of Appeals from making any presumption under section 602 of the Civil Practice Act* predicated on the failure of the Appellate Division to reverse the Surrogate's findings or the failure of the Appellate Division to make its own new findings of fact. The Court of Appeals could no longer give judgment without looking at the facts. The Court of Appeals, unlike the Surrogate, became bound by the admission "for the purposes of this proceeding", that Mrs. Rodney did not search the box for the will (R. 292). If, after resettlement, the Court of Appeals was desposed to hold that there was a

presumption of destruction *animo revocandi,* it would have to look at the facts for evidence to support a finding that the will could not be found, instead of presuming, under the statutory compulsion of section 602 of the Civil Practice Act, that the Appellate Division affirmed the Surrogate's findings, or, as stated by Mr. Timen in his affidavit:

> "it would need to so only after reviewing the facts * * * *instead of presuming that the Court agreed with the Surrogate that the will could not be found at the time of testator's death.*"

The respondent rests her whole case in this Court on the affidavit of Lawrence S. Timen. This is the same as resting upon an authority which has been subsequently overruled. The Timen affidavit could be of no use to her here unless the motion (in support of which the Timen affidavit was made) to resettle the order of reversal in the Appellate Division were denied. But the motion was not denied, it was granted, and only the resettled order of reversal appears in the transcript of record. (R., 279-283)

Answer to Respondent's Point III.

Mr. Vaughan says, on page 18 of Respondent's brief, that what happened below is seriously distorted by the petitioner here. We said that it was neither pleaded nor proved below that the will could not be found. He says it was pleaded and proved. The transcript of record discloses that it was not pleaded or proved and discloses also where the distortion lies.

Mr. Vaughan also says (same page) that his client Mrs. Rodney pleaded in her answer

> "(b) that the paper in question had been 'duly revoked' in the lifetime of deceased. She did not by her pleadings specify any theory of revocation (fol. 71)."

and on page 24 of respondent's brief:

> "This allegation is consistent with any kind or revocation including revocation presumed to have happened because the original will was not produced and its fraudulent destruction was not proved."

The theory which Mr. Vaughan here urges is subject to the fatal defect that the allegations and the proofs must agree and his client's pleading and proofs do not agree. The proof must support the pleading. In *Washington Railroad* v. *Bradleys,* 77 U. S. (10 Wall) 299, 303, this Court said:

> "* * * the allegations and the proofs must agree."

and in *Boone* v. *Chiles,* 35 U. S. (Peters) 177, 209:

> "A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree."

In *Eddy, etc.* v. *Blackburn,* 70 Fed. 949, 954:

> "It is however, stringently required that the proof must agree with and support the pleadings."

Her proof is that decedent physically destroyed the will by tearing it in 1939, thereby revoking it. That proof can support only her plea that the will was revoked by physical destruction; it is opposed to, and therefore cannot agree with or support a claim that the will could not be found, even if such a claim had been pleaded, and it was not pleaded.

Respondent further argues on page 21 of her brief that on the appeal to the Appellate Division new facts were received by that ourt, under section 309 of the Surrogate's Court Act but that

> "Such facts did not alter the essential shape of the proof as it came before the Surrogate"

and on page 24 of respondent's brief:

> "Mr. Wasserberger also says that 'No notice was ever given of any claim that after a search the will could not be found' (Petition p. 3). This statement is untrue. Such notice is contained in Mr. Wasserberger's Exhibit 7 (fols. 796-800). It is also in the petition of Mrs. Rodney for letters of administration put before the Appellate Division by Mr. Wasserberger himself (fols. 848-854)."

"The essential shape of the proof" considered by the Appellate Division was materially "altered" from what it was "as it came before the Surrogate". The Surrogate never had before him (1) Mrs. Rodney's testimony that the will was torn in her presence in 1939; (2) Mrs. Rodney's petition for letters of administration (in the administration proceeding not the probate proceeding) in which she alleged that she knew of no will of decedent and could find none, which petition was dated February 5, 1944, and (3) her *subsequent* concession in this proceeding, dated April 5, 1944, in which she conceded "for the purposes of this proceeding" (R., 292, par. 7)

> "that deponent (Mrs. Rodney) did not search decedent's safe deposit box, subsequent to the date of his death for decedent's Will",

and her *subsequent* concession (R., 291, par. 5) that she did have knowledge of a will of decedent and

> "that deponent was present when it was executed."

Her petition in the administration proceeding was not her proof *in this case* that the will could not be found. It was offered not by her, but by petitioner to show, and it did show, that the claim that the will could not be found was never advanced in the probate proceeding, but in an independent administration proceeding. In offering that petition, proponent said to the Appellate Division:

"The Surrogate stated:

> 'The daughter of deceased applied for letters of administration asserting that she had made diligent search for the will of deceased but had not found it. She asserted intestacy.'

But that was not what she asserted in the probate proceeding. That was what she asserted in the administration proceeding in her petition for letters of administration.

She did not, in the probate proceeding, assert that the will could not be found. What she alleged in her answer and asserted on the trial was that it had been destroyed and she claimed that a revocation had thereby been effected."

It is sufficient to observe, however, that her administration petition was not in evidence before the Surrogate, and when the Court of Appeals affirmed the decree of the Surrogate:

> "upon the ground that the findings of the Surrogate were in accordance with the weight of the evidence"

it affirmed a decree made by the Surrogate upon evidence which was never before him for consideration.

Mr. Vaughan relies also on the letter of George Feinberg (R. 266). This letter states that Mr. Feinberg made an

independent search for the will and is satisfied that there is no will in existence "that can be probated". He does not state that no will could be found.

But the *notice* which is required by the constitution to comply with the due process clause is not satisfied by the administration petition or the Feinberg letter. Due process requires that the *pleadings* give such notice before the issue is tried, and it was necessary that respondent's answer plead that the will could not be found. The letter and the petition antedated her answer, and once her answer was served, pleading revocation, these documents became academic because the notice given by her pleading was that the will had been revoked, and not that it could not be found.

Answer to Respondent's Point IV.

In disputing that the court below granted relief that was not within the grounds relied on by Mrs. Rodney to obtain it, respondent says:

> "Mr. Wasserberger here inverts what happened. There was not so much a grant of relief to contestant as there was a denial of relief to petitioner."

When the appeal was taken to the Court of Appeals, the will was admitted to probate. In her appeal she prayed that the decree admitting the will be reversed. In the court below petitioner was a respondent. Her prayer for relief was granted and the Court of Appeals reversed, but not upon grounds relied on by her to obtain it. She relied on her pleading and proof of revocation by actual physical destruction not upon presumed destruction.

Regarding the denial of equal treatment, respondent says at page 25 of her brief:

"If it (the Court of Appeals) failed to decide what Mr. Wasserberger calls 'the question of law as to revocation' then so too did the Surrogate in the first instance. But this constitutional ground of appeal if it ever existed was not asserted at any time by Mr. Wasserberger until his definitive defeat in the Court of Appeals."

Of course the Surrogate was not required by the State Constitution, as was the Court of Appeals, to review questions of law. The Appellate Division held as a matter of law that revocation was the "question presented" (f. 1061). This question of law (revocation is always a question of law) was squarely before the Court of Appeals and it was under constitutional mandate to review it. Its silence as to revocation was a denial of equal treatment. But the Surrogate was under no constitutional compulsion to review questions of law—he had no appellate powers whatever. Petitioner was therefore denied equal treatment for the first time by the Court of Appeals at the close of proceedings in that court.

Answer to Respondent's Point VIII.

For no apparent reason other than an unrestrained desire to besmirch a fellow member of the bar Mr. Vaughan engages in a personal attack on petitioner, stating that petitioner's motive in endeavoring to sustain the will "was concerned deeply with getting the maximum amount of money he could from the estate". He refers to the now pending appeal in the Appellate Division, and concludes by asking for double costs. We can appreciate Mr. Vaughan's contingent interest in success but can see in it no justification for vilification.

We have experienced these gentlemanly tactics in the Court below and it is sufficient to quote from our brief in the Appellate Division as follows:

"By dint of some curious twist of perverse reasoning, Mr. Vaughan argued not only in the Court of Appeals, but before the Surrogate in opposition to an allowance to proponent for counsel fees, that it was the proponent, and not his client Mrs. Rodney, who was in fact the swindler in this case; that it was the proponent who was the malefactor and that he was motivated to probate the will solely by his eagerness to 'fulfill his rosy financial expectations'. Mrs. Rodney's conduct, argued Mr. Vaughan, was not only plausible, it was honorable, and further, that her testimony and Kelekian's testimony as to the destruction of the will was truthful. This is what he argued in the face of the Surrogate's finding (concurred in by the Court of Appeals) that 'the speech and conduct of the daughter (Mrs. Rodney) leave her open to grave suspicion' (that she committed a felony) (p. 271). This is what he argued, also, in the face of a finding four times adjudicated by the Courts, that proponent's good faith was not open to question: first by the Surrogate after trial, again when this Court admitted the will to probate, thirdly when the Court of Appeals confirmed the Surrogate's findings and for a fourth time by the decision of the Surrogate which appears at page 76 of the record on this appeal. On the basis of that argument Mr. Vaughan asked that proponent be denied an allowance altogether, that proponent personally, not the estate, pay the costs, and that proponent also be adjudged to personally pay the Special Guardian's allowance.' "

The Surrogate's latest decision, above referred to, appears in the appendix herein. As to the failure of the Special Guardian to appeal, this subject is separately treated. With regard to the novel suggestion that peti-

tioner "represents interests aggregating $4000" it is sufficient to observe that no executor, save where he is also a legatee, ever has any interest other than the duty to see that the testator's wishes are not frustrated and every executor has an interest to the extent of statutory commissions.

As to the Special Guardian.

One is at a loss to understand the function of the Special Guardian's "brief". He does not criticize the decision of the Court below. He advances not a solitary authority in favor of his ward, nor does he argue for reversal; neither does he seek the granting of certiorari when his ward can profit only if certiorari is granted and reversal results.

He is not a party to the litigation pending here, and we are advised by him that upon his personal inquiry to the Clerk of this Court he was informed that he was not required to file a brief. Then why is he here in this Court? He is here, he says on page 2 of his brief "in the hope that it may be helpful to this Court in deciding the petition now pending before this Honorable Court for a Writ of Certiorari."

In concluding his brief, under caption "Special Guardian's Position on this Petition" he says that "in view of the fact that it would be to his ward's interest to have the propounded document admitted to probate, he does not oppose this petition." Then why, in the very last sentence on page 11 of his brief, did he preface that statement with the statement that "the undersigned Special Guardian cannot in his own mind see that any constitutional question is involved herein," if he in good faith intended to advance the interests of his ward by not opposing the petition?

He could with greater honesty have withheld opposition to the petition for a writ by simply abstaining from filing a brief, a course expressly indicated to him when he was informed by the Clerk of this Court that there was no need for him to file a brief. Instead, however, he files his brief in which he denies that any federal question is involved, thereby raising the only substantive ground upon which the petition may be denied. By what process is such a position intended to advance the interests of his ward in this Court? We have taken occasion at an earlier stage of this litigation when intestacy had first been decreed, to meet his similar conduct with the following comment which we quote from our reply brief in the Appellate Division of the New York Supreme Court:

> "It is appropriate at this point to comment upon the unusual attitude of the special guardian in this proceeding. His brief does not seek reversal of the decree. Neither does it seek an affirmance. For aught that appears it seeks no relief. His brief is thus less forthright than his declarations for he has stated to the appellant that he will argue for affirmance. We thus have the astonishing spectacle of a special guardian charged with the protection of the interests of his infant ward, asking for a judgment of this Court adverse to those interests which he he in duty bound to safeguard.
>
> Perhaps the attitude of the special guardian in that respect will be more easily understood from an examination of folio 517 which discloses that the special guardian, at his own instance, consulted with his ward only at the office of the attorney for the objectant, the one person in all the world who had it within her power to acquiesce in the probate of the will which would give her own child approximately $100,000. in

trust, but who elected instead of object, thereby not only depriving the ward of a substantial inheritance, but irrevocably setting up her own interests as adverse to those of the infant. Folio 517 discloses that the infant's preparation for trial and whatever interviews transpired between the guardian and his ward were conducted in the camp of the adverse party. He did not consult her in the privacy of his own offices although the opportunity was offered him (517). The special guardian did not call the ward as a witness. He conducted neither direct nor cross examination of the infant upon the trial.

The infant's interests were interwoven with those of the proponent and opposed to those of the objectant. The special guardian at no time consulted with his ward in the presence of the proponent with whose interests hers were allied. Her interests could be preserved only if the proponent prevailed. There was thus, as above stated, the astonishing spectacle of the special guardian conducting his ward's preparation for trial in the office of the attorney for the objectant whose interest was diametrically opposed to that of the infant.

It is claimed that the person aggrieved by the denial of probate is the infant but that she acquiesced therein.

Infants have immature judgment and lack experience. It was precisely in contemplation of the likelihood that an infant, out of devotion, loyalty or affection would disregard or perhaps misapprehend her interests, and out of an abiding trust in the integrity of the parent, acquiesce in a forfeiture of her interests, that the legislature in its wisdom placed on the statute books a mandate to the courts that a special guardian shall be appointed to safeguard the interests of infants.

It is thus no answer to assert that the infant acquiesced in an adverse decision. The special guardian states in his brief that he urged in the Court below that the sole issue is one of revocation, that the proof of revocation is insufficient, and that the will should be admitted to probate. It is difficult then, to understand how the special guardian did not feel aggrieved by a decision contrary to the relief he sought in the Court below and what motive impelled him to refrain from joining in the appeal although he was requested to do so by the appellant. The special guardian is under a duty to advance the interests of his ward. Far from doing so, he instigated and joined with the objectant in a futile motion before the Surrogate, after the entry of the decree, and shortly before the argument of the appeal, to compel the appellant to furnish $2500. additional security under Sec. 299 of the Surrogate's Court Act with a view to frustrating the appeal. The relief sought was a bond in favor of the objectant for damages if the appeal resulted in an affirmance. The special guardian not only joined in the motion of record, but submitted an affidavit and appeared on the argument in support of the motion. No possible benefit could inure to the infant if that motion were granted.

We come now to a consideration of the Special Guardian's brief. Not a single point or authority is offered in the infant's behalf.

Why, then, is the special guardian submitting a brief on this appeal? 'To help this Court,' he says, 'in deciding this appeal.' It is not his duty to help the Court. It is his duty to help the infant and advance her interests. He is here as a party, not as *amicus curiae*.

His ward has potential rights under the rejected will until every remedy has been exhausted. In the case of *Re Schrier's Will,* 157 Misc. 310, 283 N. Y. Supp. 234, the Court said:

> 'On the contrary, so long as his wards possess any potential rights, it is the duty of the special guardian to protect and advance those rights by every honorable means and expedient which is known and available to him, under penalty, if he proves derelict in the performance of his duties, that he may subsequently be compelled to respond in damages to his wards for his failure adequately to protect the rights which they possessed.'

His duty is not merely that of an attorney. The Court is responsible for his appointment and the infant has no voice in his employment. (*Downey* v. *Fogarty,* 175 Misc. 411, 23 N. Y. S. (2d(585.)

They assert that the infant acquiesced in the adverse decision, but the infant does not control the institution, progress or disposition of the litigation and if the appeal serves to advance her interests, the special guardian was under a duty to prosecute it regardless of the infant's desire. (*Goishen* v. *Samor Realty Co., Inc.,* 167 Misc. 477, 4 N. Y. Supp. (2d) 107, 111.)

His duty is to join in the prayer of the appellant (*Shea* v. *Bergen,* 59 Misc. 294, 110 N. Y. Supp. 572, 575).

In short, it was his duty to appeal. The Court 'will assume that the Special Guardian in making the appeal is acting within the line of his duty.'' (*Re Edwards,* 110 App. Div. 623, 97 N. Y. Supp. 185, 187.)

On this appeal the special guardian has stated he argues for affirmance of a decree adverse to his ward's

interest. This is, at the least, divided loyalty. In *Re Wechsler's Estate,* 152 Misc. 564, 273 N. Y. Supp. 968, 972, the Court said:

> 'A situation of this character requires the severe condemnation of the court. A Special Guardian is appointed for the protection of the infant, and is held to a duty of strict and undivided loyalty to the infant's interest.'

In his brief, he concludes with 'Special Guardian's Position' in which he 'submits this analysis of the testimony in the hope that it may be helpful to this court in deciding this appeal.' So far as the infant is concerned, he takes no action whatsoever.

Particularly pertinent in this connection is the decision of the Court in *Re Bielby's Estate,* 91 Misc. 353, 155 Supp. 132, 142 wherein the Court said:

> 'The special guardian in a moment of aberration, or wholly misconceiving the practice as to pleadings in this Court, filed a general formal answer used in the Supreme Court in partition and other actions, alleging:
>
> "That he is a stranger to all and singular of the matters and proceedings in said petition set forth, and submits his rights as such guardian and of the rights of said minor in the above-named estate to the court for its protection thereof."
>
> * * * Apparently the only redeeming feature in the attempted pleading is a frank confession that the special guardian "is a stranger to all and singular of the matters and proceedings." It is the duty of a special guardian, upon his appointment, to cease

> to be a stranger to all matters involving the minor's interest and to so inform himself as to the condition of those interests as to be able to intelligently and legally act at all times in court in the infant's behalf.'
>
> In the *Bielby* case (*supra*) the special guardian at least attempted to entrust the infant's welfare to the protection of the Court. In the case at bar even that gesture is lacking."

In the court below the Special Guardian stated in his brief: "Thus the pleadings directly raised the issue of revocation. * * * Upon the trial the proof closely followed the issues raised by the pleadings. * * * It is apparent, therefore, that the *sole* issue was a factual one: Was there an actual revocation of the will by the testator?"

Having thus recognized and asserted the sole issue in the case, and in the absence of any adjudication of that issue by the Surrogate or the Court of Appeals, how could the Special Guardian, who has the benefit of the cases and points in petitioner's supporting brief, assert in this Court, without advancing a single authority to support the assertion, that no constitutional question is here involved, and at the same time pretend that he seeks to advance the interests of his ward? He is not a party here, yet he appears *pro se,* but there was no need for him to appear at all, and he would have rendered his ward a far greater service if his argument were left unsaid. If certiorari is denied his ward will never gain her inheritance.

He says that he was granted costs in the Appellate Division. We are convinced he was granted such costs as a result of an oversight. He was a respondent there, and moreover, he was roundly censured on the argument by the Chief Justice for his failure to take any steps on behalf of his ward, a consideration which would negative any suggestion that the Appellate Division approved his conduct!

CONCLUSION.

The petition for Writ of Certiorari in this case should be granted.

Respectfully submitted,

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Appendix "A".

Surrogate's Court Act. Sec. 309.

"*Power of appellate court; further testimony.*

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee."

Appendix "B".

Opinion.

Law Journal 3/18/46

Estate of Henry Altmayer—In the original probate proceeding the court allowed to the unsuccessful proponent in this court his expenses incurred in the effort to probate the propounded paper. That allowance was based on a finding of good faith on the part of proponent though the court held that the instrument propounded should not be admitted as deceased's will. The finding by the Appellate Division that the proponent had in fact established the propounded paper as deceased's will necessarily confirmed proponent's good faith in the proceeding. The later determination by the Court of Appeals reversing the Appellate Division and confirming the result reached in this court does not alter the basic facts upon which good faith of the proponent was found by this court. Obviously the appeal to the Appellate Division was justified by the event in that court. Having obtained a decision that the propounded paper was in fact the will of deceased it was proponent's obligation to defend that position when the appeal was taken to the Court of Appeals. In the circumstances, his good faith on the appeal to the Court of Appeals is apparent. Against this background the court should exercise its discretion in proponent's favor in allowing him costs in the Court of Appeals. Such costs have been taxed in the sum of $465.24. In addition the court, in the exercise of discretion, allows to proponent for his expenses for counsel on both appeals the aggregate sum of $2,500. The allowance and the costs are directed to be paid out of the estate. No costs will be taxed in favor of the successful party against the proponent personally. The proposed decree on remittitur should be amended so as to recite this decision and so as to make provision for the allowances here authorized. Proceed accordingly.